

Protest of	)	
ROBIN P. McGINNIS	)	Date: March 25, 1992
	)	
Solicitation No. JAX:37:92	)	P.S. Protest No. 92-04

### DECISION

Mr. Robin P. McGinnis protests the determination of the Manager of the Jacksonville Transportation Management Service Center (TMSC) that he is a nonresponsible prospective contractor under solicitation JAX:37:92 (the solicitation) for contract highway transportation of mail between the Miami, FL, General Mail Facility and the North Metro Integrated Mail Processing Center in Atlanta, GA. The solicitation requires the contractor to provide one trip daily in each direction, except for Sundays and specified holidays.<sup>1/</sup> The estimated annual mileage for the route is 422,177 miles, with an estimated 10,177 driving hours. The solicitation requires the contractor to furnish two tandem axle tractors and two 48-foot tandem axle trailers. Mr. McGinnis was the low bidder under the solicitation, which closed on December 4, 1991. The bids received ranged in amount from \$276,000 to \$721,964. The contract was awarded to the second low bidder on December 20.

The uncontested facts leading to this protest are as follows.<sup>1/</sup> By letter of December 5, 1991, the contracting officer requested the following items from Mr. McGinnis in order to establish Mr. McGinnis' responsibility:

- (1) a written statement of how he intended to perform the service;
- (2) a completed PS Form 2025, Contract Personnel Questionnaire;
- (3) a completed PS Form 5472, Pre-Award Questionnaire;

<sup>1/</sup> Under the schedule, trucks leave each terminus shortly before midnight, driving through the night and making intermediate stops, arriving at the other terminus about 3:15 PM the following day.

<sup>2/</sup> The information is taken from the contracting officer's report and supplemental statement, neither of which were contested by the protester, who was provided a copy of each pursuant to Procurement Manual (PM) 4.5.7 g. and 4.5.7 i.

- (4) fuel receipts to substantiate the cost of fuel at the time of his bid submission;
- (5) proof of workman's compensation coverage;
- (6) a copy of his most recent bank statement;
- (7) a copy of his driving record;
- (8) a photocopy of his driver's license, front and back; and
- (9) a detailed explanation of matters concerning his credit rating.<sup>1/</sup>

Mr. McGinnis received this on December 9. On December 16, Mr. McGinnis phoned the TMSC and requested a meeting on December 18 to provide the requested information. When Mr. McGinnis arrived at the December 18 meeting, he provided only his driver's license, a vehicle insurance quote, and two fuel statements, explaining that he had not had enough time to gather the other requested items. During the meeting Mr. McGinnis completed a contract personnel questionnaire, a pre-award questionnaire, and a written statement on how he would perform the service. At the meeting, Mr. McGinnis also responded to the TMSC's concerns over his credit report and stated that he would fax his driving record, a letter of credit from a financial institution, and a bank statement to the TMSC as soon as possible.

During the meeting, TMSC personnel reviewed the pre-award questionnaire noting that the document listed three tractors and two trailers which Mr. McGinnis intended to use that were not listed as assets on the Assets and Liabilities portion of the pre-award questionnaire. When asked about this matter, Mr. McGinnis stated that this equipment was family-owned. Mr. McGinnis also indicated his family would be providing financial backing during the first few months of the contract and provided the following information concerning this backing:

- (1) a statement of a checking account for a family-owned company showing a low four-figure balance as of November 29, 1991;
- (2) an American Express statement for a family-owned business showing a three-figure credit; and
- (3) an international registration plan form the state of Georgia for the equipment identified in the pre-award questionnaire.

On December 19, Mr. McGinnis provided the following additional information:

- (1) a fuel receipt showing a cost per gallon of \$1.07.
- (2) a letter from a bank indicating that Mr. McGinnis had opened a checking account on December 19 with a balance of \$5,000.

<sup>3/</sup> A credit rating obtained by the TMSC has raised some concern about Mr. McGinnis' financial condition.

(3) another checking account showing a low two-figure balance as of November 19, 1991.

By letter of December 20, the contracting officer determined Mr. McGinnis nonresponsible because Mr. McGinnis "had failed to provide, and [the TMSC had] been unable to obtain, sufficient information...to make an affirmative determination of responsibility...." Mr. McGinnis received the contracting officer's letter on December 27, and by letter of December 28, protested the contracting officer's nonresponsibility determination.

In his protest, Mr. McGinnis challenges the nonresponsibility determination alleging that the contracting officer's actions were discriminatory since he failed to take into account the fact that Mr. McGinnis had been in the United States Marine Corps for six years. After leaving the service, Mr. McGinnis indicates he began learning the business of mail contracting by driving, loading and studying the areas of payroll, fuel costs, equipment costs and repairs as they relate to mail transportation contracting.

Mr. McGinnis states that because he was in the service he was unable to accumulate a "portfolio of wealth" with which he could establish his responsibility. In support of his responsibility, Mr. McGinnis states that he had at his disposal two tractors, had deposited \$5,000 in his personal bank account, had an additional \$10,000 which had been "loaned to him by another brother" to help him get started, had a good credit rating and had at his disposal fuel credit cards. All of this, Mr. McGinnis maintains, should have been enough to be successful on the route.

The contracting officer in his report and supplemental statement to this office states that based on the available information he was unable to make an affirmative determination of responsibility. The contracting officer notes that the bid was made in the name of Robin P. McGinnis, a sole proprietor with assets of approximately \$21,000 (including the \$5,000 deposited in his checking account on December 19), whereas the expenses of the route for the first 28 days for wages, fuel, oil and insurance would be over \$19,000. The contracting officer notes that the \$19,000 amount does not take into account additional operating expenses such as repairs, tolls and other items.<sup>4/</sup> The contracting officer states that Mr. McGinnis failed to provide documentation concerning the purchasing or leasing of equipment, either outright or through family owned/operated businesses "at the time of the pre-award interview or anytime thereafter." The contracting officer states that he did not consider the assets (including the tractors and trailers) of the other individuals who had agreed to help Mr. McGinnis since they were not bidders on the contract. The contracting officer also notes that Mr. McGinnis indicated on the pre-award questionnaire that he is a contract carrier on 5 routes, when in fact, these routes are operated by other family members and Mr. McGinnis actually only has six months' prior mail transportation contracting

<sup>4/</sup> The record does not reflect why the contracting officer picked the enumerated items as of particular relevance in determining Mr. McGinnis' responsibility to the exclusion of repairs, tolls and other expenses, particularly since one would assume that tolls must be paid on a cash basis. The contracting officer does indicate that the amount of \$19,000 is "based on 1/12th of the quotes."

experience as a driver employed by Mal Mac, Inc.<sup>1/</sup>

## Discussion

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989; Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; Cardinal Glove Company, Inc., P.S. Protest No. 89-84, November 14, 1989.

PM Section 3.3.1 a. sets forth general standards for determining whether a prospective contractor is responsible, as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors....

In order to be determined responsible, a contractor must have financial resources adequate to perform the contract (PM 3.3.1 b.1.), the necessary organization, experience and technical skills, or the ability to obtain them (PM 3.3.1 b.6), and the necessary ... technical equipment or the ability to obtain them. PM 3.3.1 b.7. PM 3.3.1 e.3 identifies various sources of information from which the contracting officer may obtain information concerning a prospective contractor's responsibility. They include records and experience data of personnel in purchasing and contracting offices, information solicited from the suppliers, subcontractors, and customers of the prospective contractor, financial institutions, Government agencies and business and trade associations. The PM further provides, "In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1.

<sup>5/</sup> The contracting officer does not further elaborate on this apparent discrepancy. There may be many reasonable explanations for Mr. McGinnis' listing of the routes, e.g., Mr. McGinnis may have been a driver on each of the routes. Without elaboration by the contracting officer, it is difficult to determine what, if any, role this apparent discrepancy played in the contracting officer's determination.

Although this office's review of a contracting officer's finding of nonresponsibility is extremely circumscribed, on the record before us we find the contracting officer abused his discretion. Our finding is limited to the facts of this case.

The contracting officer based his decision, in part, on a finding that the protester had inadequate assets to assure performance prior to the beginning of payments under the contract. That determination rests on an analysis which uses \$19,000 as the monthly operating costs of the contract. That amount apparently represents the total estimated cost to the contractor, excluding repairs, tolls and other items, not the contractor's actual out-of-pocket expenses.<sup>6/</sup> This statement of the operating costs was flawed. Though we cannot conduct an inquiry into what would constitute a reasonable estimate of the operating costs for use by the TMSO on a route of the size and type contemplated by the solicitation,<sup>7/</sup> equally we cannot sustain a decision which finds inadequate assets when premised on an owner operator's estimated monthly operating cost. As we have previously noted,

In the case of a highway contract held by an owner-operator, any distinction between the allocation of revenue to salary and profit on the worksheet is artificial. For a contractor who drives the route himself, salary is not an expense, it is a characterization of the amount in excess of expenses which the contractor hopes to receive.

The contracting officer further justifies his finding of nonresponsibility on the inadequacy of the protester's estimate of total fixed and operating costs. That analysis is flawed in that it assumes that a self-employed contractor cannot reallocate salary to operational costs. As we have pointed out, for a self-employed contractor, salary and profit are similar. There is no requirement that a contractor make a reasonable profit on a contract, or any profit at all. Thus, the contracting officer's decision, premised on an assumption that the contractor cannot subsidize costs from his salary, is arbitrary; it imposes an unreasonable restriction on a contractor.

While we recognize that it is critical for highway contractors to have cash reserves to pay for fuel, maintenance, and other expenses before receipt of the first contract payment, the contracting officer's decision in this case is arbitrary since it postulates an unreasonably high monthly operational cost as a basis for finding the protester's [assets] to be inadequate. Further, the contracting officer's decision arbitrarily imposes a requirement that the

<sup>6/</sup> The contracting officer has not clearly stated whether his analysis is based on Mr. McGinnis driving on the route or not. In response to the contracting officer's December 5 letter which asked, among other things, how Mr. McGinnis would operate the route including whether he would do so with a hired driver or as owner/operator, Mr. McGinnis stated he planned to operate the route with family members as teams without indicating clearly if he would drive. This ambiguity was not resolved by the contracting officer. Our analysis is based on the assumption, consistent with the record, that Mr. McGinnis intended to drive on the route and use hired drivers as necessary.

<sup>7/</sup> Our bid protest forum does not conduct adversary proceedings nor resolve factual disputes to any significant extent or degree.

See Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.

successful contractor not subsidize operational costs from his salary....

James E. Toney, P.S. Protest No. 88-45, October 6, 1988. (citations omitted).

The contracting officer also maintains that he was not supplied adequate information to establish that Mr. McGinnis could obtain the necessary equipment to provide the service. In this regard we have noted that the contracting officer cannot place the entire burden of establishing responsibility on the prospective contractor. See AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989. The record here does not reflect that the contracting officer indicated to Mr. McGinnis that he would have to provide documentation concerning the availability of the required equipment from family members or other sources. The failure of the contracting officer to follow up on this question by an inquiry to the sources identified by Mr. McGinnis placed too much of the burden of proving his responsibility on the bidder and taints the nonresponsibility determination. Cf. Government Products Corporation, P.S. Protest No. 84-58, December 10, 1984.

In determining that because Mr. McGinnis had bid as a sole proprietor the assets of family members could not be considered in the determination of Mr. McGinnis' responsibility, the contracting officer has misapplied our previous decisions. Our previous decisions have indicated that consideration of the assets of a partnership was inappropriate when the bidder had bid as an individual, see David Guidry, Jr. and Johnny Jackson, d/b/a Guidry and Jackson Trucking, P.S. Protest No. 87-133, March 4, 1988, and that consideration of the assets of an individual was inappropriate when the bid was in the name of a corporation, see AHJ Transportation, Inc., P.S. Protest No. 89-19, September 7, 1989. In those cases we reasoned that,

To do so would be unfair to other bidders because it would allow the bidder the option, in effect, of withdrawing his bid by allowing himself to be declared nonresponsible or substituting [his own or the partnership's] assets if he wished to perform the contract. Such an option would afford the bidder "a second bite at the apple" to the detriment of the other bidders and the competitive process.

David Guidry, Jr. and Johnny Jackson, d/b/a Guidry and Jackson Trucking, supra. (citations omitted). Those cases are not dispositive here since they turn upon an implicit modification of the bidder's bid. Mr. McGinnis has not attempted to modify his bid in anyway. He has only indicated that the required equipment will be obtained from family members. In such circumstances the contracting officer should determine whether the family member has entered into an agreement to provide the equipment just as he would if he were told that the prospective contractor would be leasing the equipment, or obtaining it in some other manner.

As to the contracting officer's judgment that Mr. McGinnis' six month's experience as a driver is insufficient to manage a mail transportation contract of the size and scope of this contract, we find no basis for the contracting officer's determination. Lack of experience could be the basis of a finding of nonresponsibility, see Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988; John F. Tyra, P.S. Protest No. 91-79, November 21, 1991, but this solicitation is not the size and scope of the contract in Cimpi (8 tractors and 40 trailers versus 2 tractors and 2 trailers here) nor has the

contracting officer supported his determination that Mr. McGinnis lacks the requisite skills as was the case in Tyra.

Lastly, as to Mr. McGinnis' allegation of discrimination, the allegation is unsupported by any factual evidence. Mere supposition is considered insufficient to overcome the presumption of regularity attending a contracting officer's performance of his official duties. E.H.O. Trucking, P.S. Protest No. 91-28, June 24, 1991; Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980.

The protest is sustained and the matter is remanded to the contracting officer for reconsideration of Mr. McGinnis' responsibility in a manner consistent with this opinion. Should Mr. McGinnis be found responsible, appropriate measures should be taken to award the service to him.

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Office of Contracts and Property Law